TAN BAK LEE v. CHEN SIEW LEE; JASMINE YEOH SEOW LING (AS PARTY CITED)

HIGH COURT MALAYA, PULAU PINANG
WONG TECK MENG JC
[DIVORCE PETITION NO: 33-55-01-2013]
15 JANUARY 2015

CIVIL PROCEDURE: *Costs – Security for costs – Application for – Divorce proceedings – Respondent applied for order that petitioner provide security for costs due to petitioner's failure to comply with a previous court order – Whether there were good grounds for security for costs to be provided – Principles applicable – Whether requirements under O. 23 r. 1(1) Rules of Court 2012 satisfied – Whether respondent failed to discharge burden of proof to establish entitlement for security to costs*

The petitioner had filed in court a petition for divorce for a dissolution of his marriage with the respondent and for a division of their matrimonial assets. The respondent, *vide* encl. 16, applied for an order that the petitioner provide security for costs in the sum of RM100,000 to the respondent for the proceeding herein. The main basis for the respondent's application was that the petitioner had failed to comply with the order of court dated 17 May 2012 whereby the High Court had ordered the petitioner, *inter alia*, to pay the respondent maintenance fees. The petitioner had never paid the said sums and the outstanding amount now due was quite substantial in excess of RM600,000. It was submitted by the respondent that it was clear that the respondent would not be able to recover any costs in this proceedings in the event she is successful unless the petitioner pay the requested sum of money as security for costs. The petitioner, on the other hand, averred that he was financially stressed and did not have the means to pay the maintenance as he had various financial commitments to fulfil.

Held (dismissing respondent's application):

(1) The application for security for costs herein had not satisfied the requirements under O. 23 r. 1(1) of the Rules of Court 2012. The reasons being were that the petitioner was ordinarily a resident within Malaysia, the petitioner was not a nominal petitioner, the address of the petitioner was correctly stated in the petition and neither was there any change of address by the petitioner with a view to evade the consequences of litigation. In addition, the value of matrimonial assets was reasonably substantial and within jurisdiction. The fact that the outstanding sums for maintenance was not paid by the petitioner to the respondent was and could not be a ground to force the petitioner to provide security for costs. (paras 11 & 12)

(2) It is trite law that the power of the court to grant security for costs under O. 23 r. 1(1) of the Rules of Court 2012 is discretionary and as a general rule, the plaintiff ordinarily resident in Malaysia could not be subjected to an application for security for costs purely on the grounds of impecuniosities (*Jiwa Harmoni Offshore Sdn Bhd v. Ishi Paower Sdn Bhd*, refd). (paras 13, 16 & 17)

(3) There was delay on the respondent's part in applying for security for costs which was eleven months after the filing of the petitioner's petition. Hence, at this stage, most of the costs were already incurred and to impose security for costs on the petitioner was most unfair. This application was designed with the sole purpose to scuttle the petitioner and prevent the determination on the division of matrimonial assets brought by the petitioner. Moreover, the petitioner had merits in his claim for the division of matrimonial assets since he was the main and sole contributor to the assets. He should be free to pursue his claim without any further obstacles. Thus, the respondent had failed to discharge her burden of proof to the court as to why she was entitled to security for costs without any justification. (paras 25 & 26)

Case(s) referred to:

Brisking Industries Sdn Bhd & Anor v. MBF Insurance Bhd [2008] 1 LNS 260 HC ***(refd)***

Faridah Begum bte Abdullah v. Dato' Michael Chong [1995] 2 CLJ 951 HC ***(refd)***

Jiwa Harmoni Offshore Sdn Bhd v. Ishi Paower Sdn Bhd [2009] 1 LNS 849 HC ***(refd)***

Kejuruteraan Taipan (M) Sdn Bhd v. Loh & Loh Construction Sdn Bhd [2007] 1 CLJ 210 HC ***(refd)***

Kemp-Welch v. Kemp-Welch and Crymes CA [1910] 233 ***(dist)***

Lina Soo (F) v. Ngu Chu Chiong @ Ngu Choo Chiong & Anor [1999] 1 LNS 76 HC ***(refd)***

Waite v. Waite (1916) 32 TLR 432 ***(refd)***

Legislation referred to:

Law Reform (Marriage and Divorce) Act 1976, s. 47

Rules of Court 2012, O. 23 r. 1(1)

Rules of the High Court 1980, O. 23

For the petitioner - Amirah Abdullah; M/s Tan Bak Lee & Co

For the respondent - Daphne Choy; M/s Choy & Assocs

Reported by Suhainah Wahiduddin

JUDGMENT

Wong Teck Meng JC:

Introduction

[1] The petitioner had filed in court a petition for divorce dated 15 January 2013 for a dissolution of his marriage with the respondent and for a division of their matrimonial assets which include (i) Malayan Banking Bhd Joint Account No: 507152121891 and/or respondent's savings, fixed

deposits and investment accounts (ii) all the petitioner's art collection originally kept at No. 29, Persiaran Minden 11700, Gelugor Penang (iii) the motorcar bearing registration No. PJC 3663 (iv) the premises known as No. 501-J15-03, Diamond Villa, Jalan Tanjung Bungah, 11200, Tanjung Bungah Penang and (v) the 1/2 undivided share in property known as Geran No. 58276, Lot No. 44, Mukim 14, Daerah Timur Laut, Penang and Geran Mukim Lot. 281, Lot No. 458, Mukim 14, Daerah Timur Laut, Penang.

[2] The respondent does not dispute the existence of the above stated matrimonial assets and she is cross petitioning for divorce but blames the petitioner for committing adultery and has named the third party involved.

[3] This is an application ('encl. 16') by the respondent for an order that the petitioner provide security for costs in the sum of RM100,000 to the respondent for the proceeding herein. The respective parties have filed in the following affidavits:

(i) affidavit of Chen Siew Lee (respondent) affirmed on 16 December 2013;

(ii) affidavit of Tan Bak Lee (petitioner) affirmed on 7 January 2014;

(iii) affidavit of Chen Siew Lee (respondent) affirmed on 26 March 2014;

(iv) affidavit of Tan Bak Lee (petitioner) affirmed on 15 April 2014; and

(v) affidavit of Chen Siew Lee (respondent) affirmed on 8 May 2014.

[4] The main basis for the respondent's application is that the petitioner has failed to comply with the order of court dated 17 May 2012 whereby the High Court ordered the petitioner to pay the respondent:

(i) RM15,000 per month as maintenance to be calculated from May 2010;

(ii) a sum of RM10,000 by or before 31 January of every year with effect from June 2012 being her expenses for her annual holiday;

(iii) a sum of RM20,000 by or before 31 March of every year with effect from June 2012 being her expenses for her trips to visit the two children of the marriage in Australia and England; and

(iv) a sum of RM6,000 costs of proceedings.

[5] It is not in dispute that the above said order was affirmed by the Court of Appeal on 20 March 2014 where costs of RM20,000 was ordered against the petitioner.

[6] It is also not disputed that the petitioner has never paid the sums pursuant to the 17 May 2012 order and the outstanding amount now due is quite substantial in excess of RM600,000 inclusive of the RM26,000 costs awarded.

[7] Accordingly, it was submitted by the respondent's counsel that from the petitioner's conduct till to date, it is clear that the respondent would not be able to recover any costs in this proceedings in the event she is successful unless the petitioner pay the requested sum of money as security for costs. The respondent averred strongly that the petitioner has the means to pay all the outstanding sums including costs.

[8] On the other hand, the petitioner averred that he is financially stressed and does not have the means to pay the maintenance as he has various financial commitments to fulfil.

Findings

[9] Order 23 r. 1(1) of the Rules of Court 2012 is the relevant provision on application for security for costs. Here, the court may order a plaintiff (the petitioner in this case) to give security for costs in favour of a defendant (the respondent in this case) of the action if it appears to the court:

(i) that the petitioner is ordinarily out of the jurisdiction;

(ii) that the petitioner is a nominal petitioner who is suing for the benefit of another person and there is reason to believe that he will be unable to pay costs if ordered to do so;

(iii) that the petitioner address is not stated in the writ or originating summons or is incorrectly stated therein; or

(iv) that the petitioner has changed his address during the course of the proceedings with a view to evading the consequences of the litigation, then if, having regard to all the circumstances of the case, the court thinks it just to do so.

[10] I will now peruse the contents of the affidavit affirmed by Chen Siew Lee on 16 December 2013 to find out whether the requirements of O. 23 r. 1(1) of the Rules of Court 2012 have been fulfilled. The only ground relied upon for this application is the failure of the petitioner to comply with the order of court dated 17 May 2012. None of the grounds listed in O. 23 r. 1(1) of the Rules of Court 2012 were deposed in the said affidavit dated 16 December 2013 in support of the application.

[11] It is my considered view, that the fact that the outstanding sums for maintenance is not paid by the petitioner to the respondent is not and cannot be a ground to force the petitioner to provide security for costs. The respondent should instead embark on the various avenues to enforce the said 17 May 2012 order.

[12] Having said that, the application for security for costs has not satisfied the requirements under O. 23 r. 1(1) of the Rules of Court 2012. The reasons being, the petitioner is ordinarily resident within Malaysia, the petitioner is not a nominal petitioner, the address of the petitioner is correctly stated in

the petition and neither is there any change of address by the petitioner with a view to evade the consequences of litigation. In addition, the value of matrimonial assets is reasonably substantial and within jurisdiction.

[13] It is trite law that the power of the court to grant security for costs under O. 23 r. 1(1) of the Rules of Court 2012 is discretionary and as a general rule, a plaintiff ordinarily resident in Malaysia cannot be subject to an application for security for costs purely on the grounds of impecuniosities (See : *Jiwa Harmoni Offshore Sdn Bhd v. Ishi Paower Sdn Bhd* [2009] 1 LNS 849)

[14] In the this case of *Faridah Begum bte Abdullah v. Dato' Michael Chong* [1995] 2 CLJ 951; [1995] 2 MLJ 404, the defendant applied under O. 23 of the Rules of the High Court 1980 ('the RHC') for an order for security for costs to be furnished by the plaintiff on the main grounds that the plaintiff, a Singaporean, was ordinarily resident out of jurisdiction, had failed to state her permanent address, was a bankrupt and did not have sufficient assets within jurisdiction. It was held, ordering the plaintiff to pay RM15,000 into court as security for costs:

(1) The mere bankruptcy or impecuniosity of a plaintiff is not a sufficient ground for ordering security for costs against it. On the other hand, the court is not precluded from ordering security for costs under O. 23 of the RHC merely by reason of the plaintiff's bankruptcy or impecuniosity. *Therefore, the court may order security for costs if, having regard to all the circumstances of the case, the court finds it just to do so.*

(2) In this case, the plaintiff's land was subject to several encumbrances, including an alleged sale, and the two companies were inactive and had no substantial assets. Although ease of enforcement is a factor to be considered, enforcement of judgements in Singapore is not automatic and *the mere fact that the plaintiff is resident in Singapore is not a ground for refusing to order security for costs. Furthermore, the plaintiff's failure to disclose her Singapore address weighed against her.*

3) The court has to avoid any attempt at a detailed investigation into the merits of the case. *This should only be done in plain and obvious cases, unlike the present case, where the issues involved were complex and the final outcome far from clear.*

[15] Hence, it is clear from the above decision that the court has the discretion under O. 23 of the Rules of Court 2012 to order security for costs in a fit and proper case by considering all the circumstances of the case and having regard to the perimeters set out in O. 23 of the Rules of Court 2012.

[16] For instance, it is therefore, not an automatic approval by the court to order security for costs against the plaintiff merely because the plaintiff is ordinarily resident out of the jurisdiction as other facts and circumstances have to be considered too, in giving the necessary weight to grant or refuse the application for security for costs.

[17] To reiterate, the respondent has not fulfilled any of the requirements stipulated under O. 23 r. 1(1) of the Rules of Court 2012. The respondent had failed to discharge her burden of proof to the court as to why she is entitled to security for costs without any justification. (See: *Kejuruteraan Taipan (M) Sdn Bhd v. Loh & Loh Construction Sdn Bhd* [2007] 1 CLJ 210; [2007] 1 MLJ 578).

[18] Counsel for the respondent referred to the case of *Lina Soo (F) v. Ngu Chu Chiong @ Ngu Choo Chiong & Anor* [1999] 1 LNS 76; [1999] MLJU 442 where the High Court by virtue of s. 47 of the Law Reform (Marriage and Divorce) Act 1976 which gives the High Court the power to grant reliefs on the principles as nearly as may be conformable to the principles exercisable by the High Court in England in matrimonial proceedings agreed with the law as stated in *Waite v. Waite* (1916) 32 TLR 432 that where a husband is ordered by the court to pay costs to his wife, and if he refuses to obey the court Order, then all proceedings in the divorce matter between the husband and wife will be stayed.

[19] I am in total agreement with the above settled law set out in *Waite v. Waite* (*supra*) but the question here in the present case is, what is the order applied for by the respondent? In prayer (ii) of encl. 16, the respondent is applying for the proceedings herein to be struck out in the event the petitioner defaults in paying the said sum for security for costs within 14 days from the date of the order. Hence, the respondent is not asking for a stay of the proceedings and in the result such a prayer (ii) should not be allowed.

[20] Furthermore, it was submitted by counsel for the respondent that the principle that the husband should provide the wife the costs in a matrimonial proceedings as she has nothing except for her husband as per the ruling made in *Kemp-Welch v. Kemp-Welch and Crymes CA* [1910] 233 which was quoted with approval in *Lina Soo (F) v. Ngu Chu Chong @ Ngu Choo Chiong & Anor* (*supra*), should be applicable in the present case against the petitioner.

[21] The relevant passages of Cozens-Hardy MR at pp. 236 and 237 of *Kemp-Welch* case are reproduced as follows:

> Now on principle it is plain that the whole foundation of the rule depends on liability of the husband to pay the necessary and fair costs of the wife's defence. I take it that that rule is founded on the old English law, which gave the whole personal property of the wife to the husband, and gave him also the income of her real estate; so that in the absence of a settlement (which, as we know, is a comparatively modern introduction) she was absolutely penniless, and therefore the Ecclesiastical Court not only provided for the costs of her defence, but also gave her alimony pendent lite so (1) (1881) 6 PD 119. (2) 6 PD at p. 121P as to provide for her maintenance. Of course the husband may say 'it is a hardship on me to have to pay the costs of my wife's false defence to a charge of adultery, or the costs of a false counter-charge against myself of adultery or cruelty'. No doubt it is a hardship, but what would the wife have to say in answer?

> Suppose the wife had brought him a sum of 10,000/., or 20,000/., or 50,000/., would not she have a right to say 'You have taken all my property from me, and am I to be left defenceless and not able to meet false charge of adultery?' *Of course it is manifest that there must be money provided for the wife to defend herself, and who is to take up the defence? Only a solicitor, who must look for payment, not to the wife, who has nothing, but to the husband; and therefore it was quite right to secure him that payment by getting money paid into court, and finally by payment of the proper costs incurred when the suit was heard.*

[22] The principle that can be distilled from *Kemp-Welch* case is that where the wife is penniless without any assets or means, the court should order security for costs against the husband to be paid to the wife for her to pursue or defend the matrimonial proceedings against the husband. The facts and circumstances are peculiar to the English case which are distinguishable from the present case here.

[23] In the present case, the respondent is not penniless. She was well taken care off by the petitioner during their good times. She is now staying in a high end condominium registered in her name and still being paid for by the petitioner. The respondent has a MBB bank account with a large disputed amount of money, lands purchased by the petitioner that were registered in her name and a car. These matrimonial assets will be hers in whatever proportions once the issue of division of the said assets has been determined by the court. It is therefore my considered view that the *Kemp-Welch* principle is not applicable here based on the facts and circumstances of the present case.

[24] Furthermore, there is delay on the respondent's part in applying for security for costs which is eleven (11) months after the filing of the petition on 17 January 2013 by the petitioner. In fact by the time encl. 16 was filed, the petition filed herein is ready to be fixed for hearing. Hence at this stage, most of the costs were already incurred and to impose security for costs on the petitioner now is most unfair.

[25] I take the view that this application which is made at a late stage of the proceedings is designed with the sole purpose to scuttle the petitioner and prevent the determination on the division of matrimonial assets brought by the petitioner. (See: *Brisking Industries Sdn Bhd & Anor v. MBF Insurance Berhad* [2008] 1 LNS 260]. Moreover, the petitioner has merits in his claim for the division of matrimonial assets since he is the main and sole contributor to the assets. He should be free to pursue his claim without any further obstacles.

[26] After having read all the affidavits and written submissions and having stated the above reasons, I dismissed encl. 16 without any order as to costs as a fair measure towards the respondent.